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No. 07-998 (3)

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

ROBERT GENTRY,
Respondent.

On Petition for a Writ Of Certiorari to the Supreme Court of California

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (amicus, its members) respectfully submits this *amicus curiae* brief in support of petitioner Circuit City Stores, Inc.'s ("Circuit City") petition for a writ of certiorari to review the decision and judgment of the California Supreme Court (the "Petition").[1]

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in many countries around the world.

A central function of the Chamber is to represent the interests of their members in important matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Chamber or its counsel made a monetary contribution to its preparation or submission. Further, Counsel of Record for all parties received notice at least 10 days prior to the due date of the Chamber's intention to file this brief. All parties have also consented to the submission of this *amicus curiae* brief. Therefore, in accordance with Supreme Court Rule 37.2, the Chamber will not file an accompanying motion for leave to file.

have raised issues of vital concern to the nation's business community.

Many of the Chamber's members, constituent organizations and affiliates routinely use uniform contracts to provide order to their affairs. In the course of their businesses, these members and affiliate organizations have adopted provisions that mandate the arbitration of disputes arising from or related to contracts that they have entered into with their employees, consumers or other parties. They use arbitration because it is a speedy, fair, inexpensive and effective method of resolving disputes. Because many of these advantages would be lost if the decision below is allowed to invalidate or call into question the kind of agreements which are at issue in this case, the Chamber has a strong interest in having its views on the validity of such agreements considered by the Court. Not only does the Chamber have a strong interest in the proper resolution of this case, its familiarity with arbitration law and doctrine may be of assistance to the Court.

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to answer for millions of businesses and their employees the persistent question of whether the pro-arbitration objectives of the Federal Arbitration Act ("FAA") must be subordinated to the mandates of state statutes and policies that are alleged to conflict with these objectives. In

answering this question, the Court will either uphold the validity of millions of contracts reflecting the intent of parties to arbitrate employment and other disputes, or throw these contracts into jeopardy by subjecting them to the strictures of state decisions that render these agreements unenforceable.

The statutory history of the FAA and the Court's prior decisions applying the FAA demonstrate a clear national policy in favor of arbitration. Businesses have taken this history and court precedent to heart and have worked for decades to provide arbitration as an alternative to litigation for the resolution of employment and other disputes. The decision below, however, attempts to reverse these efforts. The invalidation of the kinds of agreement at issue in the instant case would have far-reaching, negative consequences for both employers and employees and would call into question the validity of hundreds of thousands of similar contracts that have been carefully crafted to take advantage of the arbitral forum. These agreements reflect the parties' recognition of the well-documented benefits of arbitration -- more favorable outcomes, cost savings, and the speed of resolving disputes -- as compared to litigation.

In March 1995, respondent Robert Gentry entered into a Dispute Resolution Agreement (the "Agreement") with petitioner Circuit City in connection with his employment by Circuit City as a sales associate. The Agreement provided that any disputes arising out of Gentry's employment with

Circuit City would be settled exclusively by individual arbitration. Ignoring his obligations under the Agreement, on August 20, 2002, Gentry filed a class action in California state court against Circuit City seeking to collect overtime pay on behalf of himself and a class of other employees.

The California Superior Court and Court of Appeal held that Gentry must arbitrate his claims individually pursuant to the agreement he had entered with Circuit City. The California Supreme Court reversed and declined to apply the FAA to enforce Gentry's arbitration agreement in two similarly flawed ways. First, the court below refused to enforce the parties' arbitration agreement based on state policies that do not apply to "any contract," in direct conflict with the language of Section 2 of the FAA and this Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987). Second, the court below applied an unconscionability analysis that was hostile toward arbitration and thus in conflict with this Court's decisions in *Perry* and *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

Unless the Court intervenes to uphold the vigorous application of the FAA and confirm the enforceability of the arbitration agreement in this case, the decision below will thwart the longstanding efforts of Congress and United States businesses to advance arbitration as a viable and efficient alternative to litigation. This will be the case not only for disputes that arise in the employment context but also for those that arise in myriad other

contexts. As a result, businesses will be discouraged from continuing to provide a forum for the arbitration of disputes as the enforceability of these agreements will be far from certain. Ultimately, employees and others will no longer have the option of choosing arbitration over costly and protracted litigation.

ARGUMENT

I. The Statutory History of the FAA and the Prior Decisions of this Court Strongly Favor the Enforcement of Arbitration Agreements.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In enacting Section 2 of the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The primary purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Indeed, Congress recognized early on the

benefits of offering an arbitral forum as an alternative to litigation for settling disputes:

> It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

H.R. Rep. No. 68-96, at 2 (1924).

Since its enactment in 1925, this Court has interpreted the FAA to hold that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This Court has applied the FAA to enforce arbitration agreements in connection with a variety of statutory claims. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (civil RICO claims). In all these cases, the Court has consistently endorsed the pro-arbitration policy embodied in the FAA.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court specifically confirmed the enforceability of agreements to arbitrate in the employment context, reasoning that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123.

II. The Decision Below Calls into Question the Validity of Numerous Arbitration Agreements Intended to Govern Employment Disputes.

Businesses have been encouraged by the Court's intent to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Relying on the pro-arbitration policy espoused by the FAA and the Court's decisions supporting that policy, businesses over the past several decades have invested significant effort and resources to develop and implement policies that facilitate arbitration in the employment context. Many of the Chamber's 3,000,000 members, constituent organizations and affiliates have adopted, as standard features of their contracts, provisions that mandate the arbitration of disputes arising from or related to those contracts. These businesses have done so recognizing the advantages to both employers and employees of arbitration in resolving employment disputes.

Arbitration "saves time, saves trouble, saves money." *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary,* 68th Cong., 1st Sess. 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce); *see also* H.R. Rep. No. 97-542, at 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). Arbitration has proven to be an inexpensive, prompt, fair and effective method of resolving disputes with employees and other contracting parties. Employees may file and pursue arbitration at minimal cost. In contrast to the high costs of litigation, a large percentage of individuals who bring claims in arbitration pay nothing to pursue their claim. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). Indeed, a growing number of arbitration agreements provide that businesses will pay or advance all fees associated with them. This is certainly the case here where the parties' arbitration agreement provides that petitioner Circuit City will pay all arbitration-related fees.

Arbitration is also faster than litigation. Data on federal and state court caseloads reveal an overburdened judicial system in which delays for litigants are common. A civil case filed in a federal district court today faces, on average, a delay of over two years before reaching trial. U.S. Courts, U.S.

District Court - Judicial Caseload Profile (2007), http://www.uscourts.gov/cgi-bin/cmsd2007.pl. Parties fare no better in state court where, in 2001, a contract suit took 25 months on average to reach judgment. Bureau of Justice Statistics, Contract Trials and Verdicts in Large Counties, 2001 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc01. pdf.

In contrast, arbitrations administered by the American Arbitration Association ("AAA"), the largest arbitration provider in the United States, proceed to an award in an average of four to six months. AAA, Analysis of the American Arbitration Association's Consumer Arbitration Caseload (2007), http://www.adr.org/si.asp?id=5027. Moreover, far from supplanting the role of the courts in adjudicating claims, arbitration in fact relieves the judicial system of a significant volume of disputes which otherwise would add to the already over-taxed dockets of state and federal courts. In 2002, the AAA reported that it had handled approximately 200,000 arbitrations. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 PENN ST. L. REV. 165, 167 n.11 (2003). That is approximately 80 percent of the number of civil cases handled in federal courts in 2006. *Id.* Adding these disputes to the current backlog in the courts would only compound delays for litigants.

Arbitration also has evolved to address many of the due process concerns raised by resolving disputes outside of the judicial system. All three of

the nation's largest arbitration providers -- AAA, JAMS and the National Arbitration Forum -- have adopted policies to provide parties who submit to arbitration with the highest standards of fairness and due process. These policies include, giving employees the right to pick or veto a particular arbitrator, strict disclosure obligations for arbitrators regarding potential conflicts, limitations on arbitration costs for employees, and rules governing discovery. AAA, Employment Due Process Protocol (1995), http://www.adr.org/sp.asp?id=28535; JAMS, Policy on Employment Arbitration Minimum Standards of Fairness (2005), http://www.jamsadr.com/rules/employmentArbitration_min_stds.asp; National Arbitration Forum, Code of Procedure (2007), http://www.adrforum.com/users/naf/resources/20070801CodeofProcedure.pdf; National Arbitration Forum, Arbitration Bill of Rights (2007), http://adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf.

Finally, arbitration has yielded more favorable outcomes for employees than litigation. For example, the National Workrights Institute found that employees were almost 20 percent more likely to win employment cases in arbitration than those litigated in court. National Workrights Institute, Employment Arbitration: What Does the Data Show? (2004), http://workrights.org/current/cd_arbitration.html. Another study shows that plaintiffs who opt for employment arbitration in the securities industry

are 12% more likely to win their disputes than employees who litigate in federal court in the Southern District of New York. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J. (2003-04).

With respect to monetary recoveries, arbitration awards obtained by plaintiffs are typically the same as or larger than court awards. *Id.* In a recent study of parties who had participated in an arbitration, over 70 percent were satisfied with the fairness of the process and the outcome, including a significant number of those who had lost their arbitrations. Harris Interactive Survey, U.S. Chamber Institute for Legal Reform, Arbitration: Simpler, Cheaper, and Faster Than Litigation 24-26 (2005), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.

It comes as no surprise then that businesses increasingly have offered, and employees have chosen, to arbitrate disputes arising in the context of employment. Indeed, arbitration has become a regular fixture in most dispute resolution schemes. In this case, Circuit City provided Mr. Gentry with a reasonable period to opt out of arbitration and in no way conditioned continued employment on the execution of an arbitration agreement. Indeed, Circuit City's arbitration agreement provides that Circuit City will absorb all arbitration-related fees and permits employees to recover remedies in

arbitration to the full extent that they may have recovered in court. With all these indicia of fairness, the parties were entitled to expect that their private choice to arbitrate would be honored and enforceable.

The decision below throws these and other similar arrangements into jeopardy and threatens to dismantle the carefully constructed arbitration policies of countless businesses. The magnitude of the number of contracts affected by the decision below is at least in the hundreds of thousands, if not millions. And because the holding can be read to extend beyond the employment setting, the negative effects will likely extend to a wide variety of other contracts containing arbitration provisions.

III. The California Supreme Court's Decision Flies in the Face of National Policy and Judicial Precedent.

The decision of the California Supreme Court conflicts with not only the statutory history favoring arbitration, but also with judicial precedent by precluding the application of the FAA in two ways. First, the California Supreme Court ruling ignores this Court's prior decision in *Perry v. Thomas*, 482 U.S. 483 (1987), which provides that a court may not decline to enforce an arbitration clause based on state law principles that are hostile to arbitration, as is the case here. Second, the court below applies an arbitration-specific unconscionability analysis that is not permitted under the FAA.

The California Supreme Court reversed the decisions of the Superior Court and Court of Appeal enforcing the arbitration agreement entered into between respondent Gentry and petitioner Circuit City because it required individual arbitration of Gentry's claims and, in some instances, might preclude Gentry from pursuing his unwaivable right to overtime pay under California law. The court identified a litany of factors to be considered in determining the enforceability of the arbitration agreement including, the size of any potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill-informed about their rights and other "real world" obstacles to vindication of class members' right to overtime pay through individual arbitration.

As relevant to this case, this Court in *Southland Corp. v. Corp. v. Keating*, 465 U.S. 1, 16 (1984), held that the applicability of the FAA to enforce arbitration agreements extends to state, as well as federal, courts. Further, the Court in *Southland* explained that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 3. This prohibition in *Southland* is precisely what the California Supreme Court's decision accomplishes by subordinating the FAA to state statutes governing overtime pay that do not apply to "any contract." 9 U.S.C. § 2. Under the Supremacy Clause, those state policies are preempted by Congress's

overriding interest in upholding arbitration agreements as embodied in the FAA.

Under Section 2 of the FAA, "only state law that addresses the enforcement of contracts generally is not preempted by the FAA." *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889 (9th Cir. 2001) (internal quotations and citation omitted). If a state law applies only to some but not all contracts, however, the state law cannot defeat an agreement to arbitrate. *See Bradley*, 275 F.3d at 889-90; *Stawski Distrib. Co., Inc. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1024-26 (7th Cir. 2003); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) ; *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998). Here, the state statute in question applies only to a narrow category of employment contracts. As such, provisions of California's state labor law do not constitute "grounds that exist in law or equity for the revocation of *any* contract" as required by Section 2 of the FAA for the invalidation of any arbitration agreement. 9 U.S.C. § 2 (emphasis added). Therefore, the state statute governing overtime pay provides no basis for refusing to enforce the agreement to arbitrate, and Gentry's agreement to arbitrate must be enforced.

In addition to conflicting with decisions of the Ninth, Seventh, Fifth, Second and First Circuits, the lower court's holding conflicts with this Court's

decision in *Perry*. *See* Petition at 15-24. In *Perry*, this Court found a conflict between Section 2 of the FAA and a California Labor Code provision which required that litigants be provided a judicial forum for resolving wage disputes. The Court concluded that, "under the Supremacy Clause, the state statute must give way" when presented with such a conflict. *Perry v. Thomas*, 482 U.S. 483, 491 (1987). The Court recognized "the pre-emptive effect" of the FAA and that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . . ." *Id.* at 490 (quoting *Byrd*, 470 U.S. at 221).

More recently, this Court reaffirmed its holding in *Doctors' Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), finding that the FAA supersedes state laws when state laws do not apply to contracts generally. *Preston v. Ferrer*, No. 06-1463, 2008 WL 440670, at *2 (Sup. Ct. Feb. 20, 2008) (state law conflicts with the FAA when it "imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally"). The Court held that "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Id.*, at *3.

Second, the court below ruled that the Agreement was procedurally unconscionable because Circuit City did not inform Gentry of the disadvantages of arbitration under the Agreement

compared to litigation. This holding too runs afoul of this Court's decision in *Perry* which held that a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with . . . §2 [of the FAA]." *Perry*, 482 U.S. at 492. *Perry* stands for the proposition that a court may not construe an arbitration agreement in a manner different from that which it otherwise construes nonarbitration agreements under state law. *Id.* More specifically, the FAA prohibits states from "condition[ing] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687 .

The reason for such a rule is clear -- Congress did not intend to allow state legislatures to enact state laws or allow courts to subject arbitration to special scrutiny that would undercut the national policy favoring arbitration. Although the FAA allows certain general contract principles to remain in force, 9 U.S.C. § 2, the FAA forbids the application of state laws in a way that targets arbitration agreements and renders them unenforceable. In identifying Circuit City's failure to highlight the disadvantages of arbitration to Gentry as a basis for its unconscionability analysis, the court below accomplishes exactly that which Congress has forbidden state legislatures from doing, *i.e.*, "rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry*, 482

U.S. at 492. Therefore, the California Supreme Court's arbitration-specific unconscionability analysis is prohibited by the Court's decisions in *Perry* and *Casarotto*, and violates the letter and spirit of Section 2 of the FAA.

IV. The Decision Below Discourages the Use of Arbitration Agreements.

The holding below creates widespread confusion and uncertainty regarding the enforceability of arbitration agreements. The decision calls into question the validity of hundreds of thousands of contracts containing arbitration provisions. If employees are routinely permitted to abandon arbitration agreements in favor of litigation, employers will have no incentive to promote arbitrate as an option to settle employment disputes. With no assurance that arbitration agreements will be enforced, businesses inevitably will discontinue their use going forward. Employees as well will suffer from the resulting lack of opportunity to arbitrate employment disputes. The impact will be particularly harsh on employees with claims where arbitration provides the only hope of quick and inexpensive redress of grievances. Nothing could more frustrate the purpose of the FAA.

CONCLUSION

The Petition raises a question of grave concern to businesses, employees and other parties

to agreements to arbitrate. The reach and authority of the FAA to enforce arbitration provisions in employment and other contracts is seriously undermined by the decision below. If not overturned, the decision threatens to unravel numerous contracts based upon agreements to arbitrate and functionally diminish the use of arbitration agreements in the future. Moreover, the decision below clashes with the decisions of this Court and circuit courts across the nation, including decisions of the Ninth Circuit. For these reasons, the Chamber respectfully requests that the Court grant Circuit City's petition for writ of certiorari to review the decision and judgment of the California Supreme Court.

March 3, 2008

Respectfully submitted,

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